PYWATECH (M) SDN BHD

v.

VISTA-PRISMA SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: S5-24-2345-2002]
14 FEBRUARY 2003

CONTRACT: *Rescission - Compensation - Sale and purchase agreement - Sale of property - Default by both parties - Failure to deliver vacant possession and failure to pay progress payments - Whether agreement to be terminated - Whether vendor entitled to liquidated damages - Contracts Act 1950 ss. 55, 56(1), 65, 76 - Specific Relief Act 1950, ss 36, 37*

The plaintiff had entered into an agreement to purchase a certain property from the developer/defendant and had paid a deposit of RM20,190.10 therefor. The defendant had not been able to deliver vacant possession within the stipulated time, and only sought to do so some 34 days later, whereupon the plaintiff terminated the agreement and claimed for the refund of the deposit. The facts showed however that the plaintiff had also been in breach of the agreement for failing to pay the progress payments demanded of them, and that being so, the defendant too terminated the agreement and applied for damages against the plaintiff. In the circumstances, before the learned judge, a question *inter alia* arose as to whether the court ought to declare the agreement (and the supplemental agreement thereof) as being terminated, and if so whether the plaintiff was entitled to the refund of the deposit.

Held (terminating the agreements and forfeiting the deposit):

[1] Under s. 56 of the Contracts Act 1950 a contract will be construed to be avoidable at the option of the promisee if the intention of the parties at the relevant time is that time is the essence of the contract. (p 690 h)

[2] The facts showed that both parties were at fault. The plaintiff, having paid the 10% amounting to RM20,190.10, had subsequently refused to pay the balance despite repeated demands thereof being made, whilst the defendant was only prepared to hand over vacant possession after the deadline period. Be that as it may, the plaintiff's delay to pay the defendant for the stages of development of the property was far more serious compared to the defendant's 34-day delay to deliver vacant possession. (pp 684 b-c, 695 f-g & 694 f-g)

[3] Under the agreement only the defendant is authorised to terminate the agreement whilst the plaintiff has no power to do so. This is clearly borne out in cl. 8 of the agreement. So when the defendant terminated both the agreements the defendant was entitled to the remedies as exemplified in cl. 8(1)(i) to 8(1)(iv) of the agreement. These remedies were of great benefits to the defendant. (p 695 a-b)

[3a] A necessary and fair order would be to declare both agreements as having been terminated, and allow the defendant to deal with or dispose off the bungalow lot in such manner as the defendant shall deem fit. Further, the payments previously paid by the plaintiff including the 10% deposit herein shall be dealt with in accordance with cl. 8(1)(ii) (a) to 8(1)(ii)(d) of the agreement, *ie*, shall be forfeited to the defendant as agreed liquidated damages. (pp 695 d-e & 696 a)

Case(s) referred to:

Aberfoyle Plantations Ltd v. Khaw Bian Cheng [1962] MLJ 174 ***(refd)***
Argyll v. Argyll [1967] Ch 302 ***(refd)***
Ayadurai v. Lim Hye [1959] MLJ 143 ***(refd)***
Beca (Malaysia) Sdn Bhd v. Tan Choong Kuang & Anor [1986] 1 CLJ 20 SC ***(refd)***
Chye Fook & Anor v. Teh Teng Seng Realty Sdn Bhd [1989] 1 MLJ 308 HC ***(refd)***
Dering v. Earl of Winchelsea [1787] 1 Cox 318 ***(refd)***
Eng Mee Yong & Ors v. Letchumanan [1979] 2 MLJ 212 PC ***(refd)***
Ganam Rajamany v. Somoo s/o Sinnah [1984] 2 MLJ 290 FC ***(refd)***
Himatsing & Co v. Joitaram [1970] 2 MLJ 246 ***(refd)***
Ismail Bin Haji Embong v. Lau Kong Han [1970] 2 MLJ 213 ***(refd)***
Jamshed Khodaram Irani v. Burjorji Dunjibhai [1916] LR 43 IA 26 ***(refd)***
Jones v. Lenthal [1669] 1 Ch Cas 154 ***(refd)***
Kang Yoon Mook Xavier v. Insun Development Sdn Bhd [1995] 2 CLJ 471 HC ***(refd)***
Lock v. Bell [1931] 1 Ch 35 ***(refd)***
Loughran v. Loughran [1934] 292 US 216 ***(refd)***
Meyers v. Casey [1913] 17 CLR 90 ***(refd)***
Moody v. Cox [1917] 2 Ch 71 ***(refd)***
Parkin v. Thorold [1852] 16 Beav 59 ***(refd)***
Pusat Bandar Damansara Sdn Bhd & Anor v. Yap Han Soo & Sons Sdn Bhd [2000] 1 CLJ 346 CA ***(refd)***
Sea Housing Corporation Sdn Bhd v. Lee Poh Choo [1982] CLJ 355; [1982] CLJ (Rep) 305 FC ***(dist)***
Sharikat Eastern Plastics Industry v. Sharikat Lam Seng Trading [1972[1 MLJ 21 ***(refd)***
Tan Hock Chan v. Kho Teck Seng [1980] 1 MLJ 308 ***(refd)***
Yeow Kim Pong (Realty) Ltd v. Ng Kim Pong [1962] MLJ 118 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 55, 56(1), (3), 65, 76
Housing (Control and Licensing of Developers) Rules 1980, r. 10(2)
Specific Relief Act 1950, ss. 36, 37

For the plaintiff - Authur Wang Ming Way (Mohd Azmil Md Zain); M/s Arthur Wang, Lian & Assocs
For the defendant - Dallumah Krishna (Tan Foong Luen); M/s Tan, Goh & Assocs

Reported by WA Sharif

JUDGMENT

Abdul Malik Ishak J:

Introduction

By way of an originating summons in encl. (1) the plaintiff sought for the following prayers:

(1) for a declaration that the defendant has breached the sale and purchase agreement dated 8 September 1997 (hereinafter referred to as the "said agreement") and that the plaintiff has rightfully rescinded the said agreement on 19 April 2002 by way of a letter from the plaintiff's solicitor or at any date which this Honourable Court thinks fit and proper or, by way of an alternative, a declaration that the said agreement has been terminated by virtue of a breach of the said agreement by the defendant;

(2) that the plaintiff be refunded for the amount of RM20,190.10 being the 10% deposit paid for the purchase of the land (referring to the bungalow lot) that was purchased by the plaintiff from the defendant;

(3) further or in the alternative, damages payable to the plaintiff for the breach of the said agreement by the defendant;

(4) interest at the rate of 8% per annum from 19 April 2002 until the date of judgment;

(5) interest at the rate of 8% per annum upon the judgment sum that has been adjudicated from the date of the judgment till the date of full settlement;

(6) costs of and ancillary costs pertaining to the application payable by the defendant to the plaintiff;

(7) any other order or relief which this Honourable Court deems fair and suitable; and

(8) any other order which is regarded as necessary and fair by this Honourable Court.

The application in encl. (1) was supported by an affidavit of Gan Boon Kian that was affirmed on 20 June 2002 as seen in encl. 2. Gan Boon Kian was described as the director of the plaintiff's company. The response to encl. 2 can be seen in encl. 4 which was an affidavit in reply of Lim Choo Kee @ Lim Teck Yow, a director of the defendant's company, who affirmed the affidavit in reply on 26 July 2002. Enclosure 6 would be in response to encl. 4 and encl. 6 was the affidavit in reply of Gan Boon Kian that was affirmed on 22 August 2002.

At the outset, the parties magnanimously agreed that the decision of this case would bind the two other cases, namely:

(1) originating summons no: S3-24-2330-2002 between C.I. Trading Sdn Bhd and Vista-Prisma Sdn Bhd; and

(2) originating summons no: S5-24-1248-2002 between Bina Sing Yap Sdn Bhd and Vista-Prisma Sdn Bhd.

That was indeed a wise move.

I am grateful to the parties because they have magnanimously prepared the "statement of agreed facts" and it can be found in encl. 8 and I now need to reproduce them verbatim. It is worded in this way:

1. The Defendant is a private limited company incorporated in Malaysia, licensed under the Housing Developers Act (Control and Licensing) 1966 and having its registered address at 5th Floor, Campbell Complex, 98 Jalan Dang Wangi, 50100 Kuala Lumpur.

2. The Plaintiff and the Defendant have entered into a Sale and Purchase Agreement dated 08/09/97 (hereinafter referred to as 'the said agreement') to buy a property known as Plot No. 69, Barbara Forest Park, Lenggeng for RM201,901.00 subject to the terms and conditions in the said Agreement. [A copy of the said Sale and Purchase Agreement is found in Exhibit 'GBK-1' of Enclosure 2].

3. According to Clause 16(1) of the said Agreement, vacant possession of the said Property must be handed over to the Plaintiff upon completion of the infrastructure works referred to in Clause 11 which in any case shall not be later than thirty (30) calendar months from the date of the Sale and Purchase Agreement.

4. Clause 11(1) of the said Agreement states that the Defendant shall at its own cost and expense construct or cause to be constructed the Basic infrastructure in accordance with the requirements and standards of the Appropriate Authority concerned and the Plaintiff shall be responsible for the cost and expense in maintaining and constructing all internal drains, internal roads, septic tank, water pipes, electrical works and internal infrastructure.

5. Clause 25 of the said Agreement provides that time shall be the essence of the contract.

6. The Plaintiff has signed a Supplemental Agreement with the Defendant on 23/03/98 to replace the words 'thirty (30) months' in Clause 16(1) of the said Sale and Purchase Agreement to 'fifty four (54) months' in respect of the delivery of vacant possession of the said property.

7. The date for the delivery of vacant possession is on or before 25/02/02.

8. The Defendant failed to deliver the vacant possession to the Plaintiff on or before 25/02/02.

9. The Plaintiff purportedly terminated the said Agreement and the said Supplemental Agreement by giving notice of termination dated 19/04/02 to the Defendant.

10. The Plaintiff has paid a sum of RM20,190.10 being the deposit only for the Sale and Purchase Agreement.

11. The Defendant has sent various notices via letters dated 15/12/01, 16/01/02 and 28/02/02 requesting for the instalments but the Plaintiff have not paid despite the notices.

12. The Defendant has further sent out a letter dated 12/04/02 requiring the Plaintiff to take vacant possession failing which vacant possession would be deemed delivered on 26/04/02.

It must be mentioned here that paras. 10, 11 and 12 as reproduced above constituted the "supplementary agreed facts" that were added by the parties at a later stage. That clearly showed the generosity on both sides. It is apparent that there was a supplemental agreement dated 23 March 1998 but that supplemental agreement was not alluded to in prayer (1) of encl. (1). Upon reading encl. 4, I cannot help but notice that the defendant too had by letter dated 30 April 2002 terminated the said agreement dated 8 September 1997 and the supplemental agreement as well. Exhibit "LCK 5" of encl. 4 is the letter of termination advanced by the defendant and it is dated 30 April 2002 and it is worded in this way:

VISTA-PRISMA SDN BHD

30th April 2002

PYWATECH (M) Sdn Bhd **By A.R. REGISTERED/POST/FAX**
No. 5B & C, Jalan Kenari 17/D
Bandar Puchong Jaya
Puchong
47100 Selangor Darul Ehsan

Attn: Mr. Gan Boon Kian

Dear Mr. Gan

RE: TERMINATION OF SALE & PURCHASE AGREEMENT DATED 08/09/1997 & SUPPLEMENTAL AGREEMENT DATED 23/03/1998

PLOT NO	:	16
PROPERTY TYPE	:	ORCHARD LAND
PROJECT	:	BARBARA FOREST PARK, LENGGENG
INDIVIDUAL TITLE	:	H.S.(D) No. 138504 P.T. No. 1221
PURCHASE PRICE	:	RM201,901.00

We refer to our letter dated 28th February 2002 and regret to note that you have failed/neglected and/or refused to settle the outstanding payment within the period stated in the said letter.

Please be informed that by your default you had breached the above Sale and Purchase Agreement dated 08/09/1997 and the Supplemental Agreement dated 23/03/1998 and the said Agreements are deemed to be terminated. In the circumstances we have forfeited your payment of RM20,190.10 as per Clause 8 of the Sale and Purchase Agreement.

Thank you.

Yours faithfully
VISTA-PRISMA SDN BHD

Sgd. (Illegible)
JAMES T.Y. LIM
Director

The parties too magnanimously agreed and put forward a "statement of agreed issues" as seen in encl. 7 and it is worded in this fashion:

1. Whether there was a breach of the Sale and Purchase Agreement dated 08/09/97 and the Supplemental Agreement dated 23/03/98 by the Defendant.

2. If the answer for the above is (in the) affirmative, then whether the breach entitles the Plaintiff to terminate the said Agreement and the said Supplemental Agreement.

The issues seemed to have been narrowed down and agreed by the parties but the oral submissions of the learned counsel for both sides brought forth other matters which were quite germane to the occasion and I will allude to them in the course of this judgment.

Both the parties also agreed that in the course of submitting on encl. (1), they are not relying on the Housing Developers (Control and Licensing) Act, 1966 and the Housing Developers (Control and Licensing) Regulations 1989.

It must be put on record that Mr Arthur Wang Ming Way assisted by Mr Mohd Azmil bin Md Zain acted for the plaintiff in the present originating summons as well as for the other plaintiffs in originating summons no: S3-24-2330-2002 and in originating summons no: S5-24-1248-2002. While Mr Dallumah Krishna assisted by Mr Tan Foong Luen acted for the defendant in the present originating summons as well as the other defendants in originating summons no: S3-24-2330-2002 and in originating summons no: S5-24-1248-2002.

To The Heart Of The Matter

It was argued that the plaintiff had the right to rescind the said agreement and the supplemental agreement because the defendant had breached both these agreements by not delivering vacant possession of the bungalow lot at Barbara Forest Park, Lenggeng on or before 25 February 2002. Relying on s. 56(1) of the Contracts Act 1950, it was argued on behalf of the plaintiff that both these agreements have become voidable at the option of the plaintiff. And that in exercising its option the plaintiff had chosen to rescind both these two agreements. It is interesting to note that in *Chye Fook & Anor v. Teh Teng Seng Realty Sdn Bhd* [1989] 1 MLJ 308, Abdul Malek Ahmad J (now a Senior Federal Court judge) was of the view that under s. 56 of the Contracts Act 1950 a contract will be construed to be voidable at the option of the promisee if the intention of the parties at the relevant point of time is that time is the essence of the contract. I had occasion to vigorously apply *Chye Fook*'s case when I heard the case of *Kang Yoon Mook Xavier v. Insun Development Sdn Bhd* [1995] 2 CLJ 471. Now, in *Kang Yoon Mook Xavier v. Insun Development Sdn Bhd (supra)*, I was of the view that as time was of the essence, the time fixed to deliver the single-storey low cost house to the purchaser became the essential condition of the agreement between the parties and that since the developer had breached that condition, the purchaser had

the right to elect whether to rescind the contract and claim for damages under s. 56(1) and s. 65 of the Contracts Act 1950 or to treat the agreement as continuing and to sue for damages. I too held that the purchaser in that case had rightly exercised his former option and thus he was entitled to terminate the agreement and obtain the refund of the money which he had paid and also to secure the post-rescissionary damages as envisaged under s. 76 of the Contracts Act 1950.

It must be borne in mind that both the agreements in *Chye Fook*'s case and that of *Kang Yoon Mook Xavier v. Insun Development Sdn Bhd (supra)* followed the standard formats as prescribed in Schedule E of the Housing Developers (Control and Licensing) Act 1966 where there were no provisions providing for the purchasers to terminate the agreements. But nevertheless it was the submission of the learned counsel for the plaintiff here that these two cases – referring to *Chye Fook's* case and *Kang Yoon Mook Xavier v. Insun Development Sdn Bhd (supra),* are applicable and should be vigorously applied in the context of the principles of law which they enunciated and that they are of universal application. It was a submission that was certainly thought provoking. Another interesting case would be that of *Yeow Kim Pong Realty Ltd v. Ng Kim Pong* [1962] MLJ 118, a decision of the Privy Council with the coram of Lord Hodson, Lord Guest and the Rt Hon LMD De Silva. The facts in that case may be stated as follows. There the plaintiff, who was the respondent in the appeal, had on 24 March 1956 entered into an agreement with the defendant, who was the appellant in the appeal, for the purchase of 22 lots of land. It was one of the terms of the agreement that an initial payment of $15,000 should be made followed by a further sum of $24,000 on or before 28 June 1956 and a final payment of $27,000 on or before 23 December 1956. The respondent failed to pay the stipulated $24,000 by the date specified and the appellant informed the respondent that in consequence thereof the deposit of $15,000 was forfeited and the contract was to come to an end. The respondent then asked for an extension of time to pay the said $24,000. The appellant agreed to an extension of time provided that certain conditions as laid down in a supplementary agreement were satisfied, namely:

(1) To pay the sum of $5,000 forthwith and the balance of $19,000 to be paid on or before 31 July 1956.

(2) Construction work on the above land to be commenced within one week of the date hereof.

(3) Construction must have begun on any land that was sought to be transferred.

(4) Should there be any breach of the above conditions, the sum of $5,000 that was paid, was to be forfeited and the extension of time withdrawn.

The respondent failed to abide by and in accordance to the supplementary agreement and so the appellant terminated the contract in writing on 1 September 1956 and forfeited the moneys that were paid. The question that arose for consideration of the court was whether the supplementary agreement was binding on the respondent. The learned trial judge held that the supplementary agreement was binding on the parties, and as the respondent was in breach of it, the learned trial judge dismissed the respondent's action. The decision of the learned trial judge was subsequently reversed by the Court of Appeal. On appeal to the Privy Council by the appellant, the decision of the Court of Appeal was reversed. The Privy Council held that the supplementary agreement was binding on the parties and that time was of the essence of the agreement. The Privy Council also held that there was a breach of the supplementary agreement by the respondent and that the appellant was entitled to rescind the contract on 1 September 1956 and this was accordingly done by the appellant.

In brief, the Privy Council in the case of *Yeow Kim Pong Realty Ltd v. Ng Kim Pong (supra)* held that the appellant there was entitled to rescind the supplementary agreement as there was a breach on the part of the respondent to pay and to commence works as stipulated in the supplementary agreement and that time too was of the essence of the supplementary agreement.

Yet another interesting case would be that of *Tan Hock Chan v. Kho Teck Seng* [1980] 1 MLJ 308, a decision of the then Federal Court (Chang Min Tat FJ, Salleh Abas FJ, and Charles Ho J) and the facts may be stated as follows. There the respondent was a building contractor who was employed by the appellant to build 6 units of 3 storeyed shop houses at the agreed cost of $223,000. Payment for the construction was by progress payments dependent on the completion of the several stages of construction. The contractor completed 5 of the 6 shop houses. The respondent contractor put some work on the sixth shop house but he was unable to complete it because of a claim by the occupier of the land – the third party, to ground tenancy rights. The respondent claimed the balance of the contract price less the amount paid to him under the progress payments and also for extra work and materials supplied. The learned trial judge awarded the respondent $5,540 on a quantum meruit and $6,500 assessed as the reasonable profit which the respondent contractor could expect to make on that sixth house. The appellant appealed. The then Federal Court held:

(1) that by the appellant's failure to give effective possession of the lot for the sixth house, the appellant had broken his covenant and the respondent contractor could rescind the contract;

(2) that the respondent contractor had rescinded the contract when he served the writ and the statement of claim on the appellant; and

(3) that the claim by the respondent contractor for quantum meruit for work done and for cost of extras must succeed but the claim for loss of profits could not succeed and towards this extent the appeal was allowed.

Reference to the case of *Beca (Malaysia) Sdn Bhd v. Tan Choong Kuang & Anor* [1986] 1 CLJ 20, a decision of the then Supreme Court with a coram of Lee Hun Hoe CJ (Borneo), Wan Suleiman and Seah SCJJ should also be made. There the then Supreme Court held that the agreement in that case had become voidable at the option of the purchasers and therefore the purchasers had elected to rescind the contract and were entitled to the refund of the deposit. It must be emphasised that the appellants in *Beca's* case were housing developers who developed an area of land in Sandakan at mile 2, Leila Road, Tanah Merah into a commercial and residential complex known as Leila Komplex. The respondents purchasers had agreed to buy three units of flats costing $703,685 from the appellants and on 1 May 1981 paid a deposit of $20,000. It was common ground that the deposit was made before the issuance of the developers' licence and the sale advertisement permit on 26 September 1981. The respondents purchasers were asked to sign the sale and purchase agreement on 23 May 1981 and they refused. Instead, through their solicitors, the respondents purchasers claimed for the refund of the deposit on the ground that the deposit was collected illegally under r. 10(2) of the Housing (Control and Licensing of Developers) Rules 1980 and that these Rules were made under the Housing (Control and Licensing of Developers) Enactment 1978 on 23 January 1980 and were gazetted on 15 May 1980 to come into force on 1 July 1980.

This would be followed by the case of *Eng Mee Yong & Ors v. Letchumanan* [1979] 2 MLJ 212 PC, where Lord Diplock (delivering the judgment of the Privy Council), in considering the effect of the failure to perform the contract within the prescribed time, held (see p. 218 of the report):

> Time being of the essence of the provisions in the Sale Agreement for payment of the purchase price, the failure of the caveator to pay on the due date was a breach of condition which the caveatees were entitled to elect to treat as bringing the contract to an end.

Now, flowing from all these salient authorities, submissions were made on behalf of the plaintiff to the effect that the plaintiff was entitled under the law to rescind the said agreement and the supplemental agreement and that the plaintiff

was further entitled to obtain compensation for any damages suffered by it during the non-fulfillment of both these two agreements. And germane to the occasion would be s. 76 of the Contracts Act 1950 which enacts as follows:

> 76. Party rightfully rescinding contract entitled to compensation.
>
> A person who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.
>
> ILLUSTRATION
>
> A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her $100 for each night's performance. On the sixth night A willfully absents herself from the theatre, and B, in consequence, rescinds the contract. B is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.

But the facts of this case showed that both parties were at fault. The plaintiff only paid the first 10% amounting to RM20,190.10 and subsequently refused to pay the balance despite repeated demands. The defendant, on the other hand, was prepared to hand over vacant possession after the deadline period.

It must be emphasised that the purchase price of the bungalow lot was in the sum of RM201,901. And that the deadline to hand over vacant possession of the bungalow lot was on 25 February 2002.

The affidavit in reply in encl. 4 was worth reading. It revealed that the defendant had sent various notices of demand to the plaintiff to pay the purchase price in accordance with cl. 5 of the said agreement which was worded in this way:

> 5 SCHEDULE OF PAYMENTS
>
> (1) The Purchase Price shall be paid by the Purchaser to the Vendor by instalments at the time and in the manner as prescribed in the Fourth Schedule hereto.
>
> (2) Every notice referred to in the Fourth Schedule requesting for any payment shall be supported by a certificate signed by the vendor's Consultant Engineer or Architect or such other consultant in charge of the project and every such certificate so signed shall be proof of the fact that the works therein referred to have commenced and or have been completed as the case may be.

The various notices of demand sent by the defendant may be categorised as follows:

(i) notice of demand dated 15 December 2001 as seen in exh. "LCK1" of encl. 4 showing the sums that were due from stage 2 to stage 6 in the amount of RM107,525.66 inclusive of accumulated interests;

(ii) notice of demand dated 16 January 2002 as reflected in exh. "LCK2" of encl. 4 showing the sums that were due from stage 2 to stage 6 amounting to RM108,587.72 inclusive of accumulated interests;

(iii) notice of demand dated 28 February 2002 as reflected in exhibit "LCK3" of encl. 4 mirroring the sums that were due from stage 2 to stage 6 amounting to RM110,014.86 inclusive of accumulated interests;

(iv) notice of demand dated 12 April 2002 as reflected in exh. "LCK4" of enclosure 4 showing the total sums that were due amounting to RM181,710.90 and vacant possession was also given and I will revert to this in due course; and

(v) notice of demand dated 30 April 2002 as reflected in exh. "LCK5" of encl. 4 evidencing termination of the said agreement as well as the supplemental agreement and this has been reproduced earlier in this judgment.

It must be borne in mind that only after the first four notices as alluded to above were sent to the plaintiff, did the plaintiff quickly acted to instruct its solicitors to send their notice of termination dated 19 April 2002 as reflected in exh. "GBK4" of encl. 2 to the defendant. That notice of termination by the plaintiff was sent to the defendant notwithstanding the fact that the plaintiff did not comply with the defendant's notices of demand requesting for payments as alluded to in para. (i) to para. (iii) of the above. The AR card that accompanied the plaintiff's notice of termination was exhibited as exh. "GBK4" of encl. 2 and it showed that the plaintiff's notice of termination was received by the defendant on 29 April 2002.

Now, reverting back to the notice of demand that was sent by the defendant to the plaintiff dated 12 April 2002 as seen in exh. "LCK4" of encl. 4, it would be ideal to reproduce that notice of demand as it also showed that by that notice (which was, in fact, a letter) the defendant required the plaintiff "to take delivery of vacant possession of the aforesaid property within 14 days from the date hereof". That notice of demand (which was, in fact, a letter) was worded as follows:

VISTA-PRISMA SDN BHD

12th April 2002

Pywatech (M) Sdn Bhd **BY REGISTERED**
No. 5B & C, Jalan Kenari 17/D
Bandar Puchong Jaya
Puchong
47100 Selangor Darul Ehsan

Attn: Mr Gan Boon Kian

Dear Sirs

RE: DELIVERY OF VACANT POSSESSION

PLOT NO	: 16
PROPERTY TYPE	: ORCHARD LAND
PROJECT	: BARBARA FOREST PARK, LENGGENG
INDIVIDUAL TITLE	: H.S.(D) No.138504 P.T. No. 1221
PURCHASE PRICE	: RM201,901.00

We are pleased to inform you that vacant possession of the aforesaid property is ready to be delivered to you. Kindly therefore settle your outstanding amount of RM193,158.42 (as per statement attached) by way of Bank Draft/cash within fourteen (14) days from the date hereof.

Please be informed that the handing over of the above said property is subjected to the full settlement of the purchase price (inclusive of your financiers portion), maintenance/miscellaneous charges and interest on late payment (if any).

Kindly note that you are required to comply with the above and to take delivery of Vacant Possession of the aforesaid property within 14 days from the date hereof. We shall not be held liable for any loss or damage to the said property upon the expiration of the aforesaid fourteen (14) days period pursuant to the provisions of the Sale & Purchase Agreement.

Yours faithfully
VISTA-PRISMA SDN BHD

Sgd. (Illegible)
JAMES T.Y. LIM
Director

c.c. M/s Rashid Asari & Co – [Ref: 1181/971/C/RAS(S)/VP/PMSB]

And the statement which was also annexed as exh. "LCK4" of encl. 4 was worded in this way and the amount computed was not inclusive of the interest that was leviable:

VISTA-PRISMA SDN BHD

Pywatech (M) Sdn Bhd
No. 5B & C, Jalan Kenari 17/D
BANDAR PUCHONG JAYA
47100 PUCHONG, SELANGOR DARUL EHSAN.

Date : 12-04-2002
Due Date : 26-04-2002
Invoice Number : IV10492

REGISTERED

Dear Sir(s)/Mdm

RE: PLOT NO : 016
PROJECT : BARBARA FOREST PARK, LENGGENG
PURCHASE PRICE : RM 201,901.00
PURCHASER'S NAME : PYWATECH (M) SDN BHD

NOTICE OF PAYMENT

We are pleased to inform (you) that the construction of the said plot has reached the stage of: PRACTICAL COMPLETION OF BASIC INFRASTRUCTURE WORKS AND DUE FOR DELIVERY OF VACANT POSSESSION OF THE SAID PLOT as certified by the Engineer's Certificate enclosed. The progress payments as shown in the FOURTH SCHEDULE below is due to us:

FOURTH SCHEDULE:	PURCHASER'S OUTSTANDING	FINANCIER'S OUTSTANDING	TOTAL OUTSTANDING
1. 10% UPON SIGNING OF THE SALE AND PURCHASE AGREEMENT	RM 20,190.10		20,190.10
2. 10% AT THE EXPIRY OF TWO CALENDAR MONTHS FROM THE DATE OF THE S & P AGREEMENT	RM 20,190.10		20,190.10
3. 10% THE COMMENCEMENT OF SITE CLEARING FOR ROAD WORKS SERVING THE SAID PLOT	RM 20,190.10		20,190.10
4. 10% THE COMPLETION OF SITE CLEARING FOR ROAD WORKS SERVING THE SAID PLOT	RM 20,190.10		20,190.10
5. 10% THE COMPLETION OF EARTHWORKS FOR ROAD WORKS SERVING THE SAID PLOT	RM 20,190.10		20,190.10
6. 10% THE COMPLETION OF CRUSHER-RUN FOR ROAD WORKS SERVING THE SAID PLOT	RM 20,190.10		20,190.10

7.	10% THE COMPLETION OF PREMIXING FOR ROAD WORKS SERVING THE SAID PLOT	RM 20,190.10		20,190.10
8.	10% THE COMPLETION OF WATER RETICULATION SERVING THE SAID PLOT	RM 20,190.10		20,190.10
9.	10% THE COMPLETION OF ELECTRICAL CABLING SERVING THE SAID PLOT	RM 20,190.10		20,190.10
10.	10% PRACTICAL COMPLETION OF BASIC INFRASTRUCTURE WORKS AND DUE FOR DELIVERY OF VACANT POSSESSION OF THE SAID PLOT	RM 20,190.10		20,190.10
	TOTAL	RM 201,901.00	0.00	201,901.00
	Amount Paid	RM 20,190.10	0.00	20,190.10
	AMOUNT DUE FOR PAYMENT	RM 181,710.90	0.00	181,710.90

We shall be pleased if you could kindly forward your remittance soonest possible in favour of VISTA-PRISMA SDN BHD.

Without prejudice to our rights and remedies under the Sale & Purchase Agreement, please note that interest of 12.00% per annum will be charged on the overdue amount until payment is received by us.

Yours faithfully,

VISTA-PRISMA SDN BHD c.c. 1)

Sgd. (Illegible)
...
Authorised Signatory

Now, prior to the defendant sending out the letter dated 12 April 2002 via the registered mail on 13 April 2002 as reflected in the "resit pengeposan pos daftar dalam negeri" marked as exh. "LCK4" of encl. 4, the plaintiff had delayed and failed to make the necessary payments for the following stages of development of the bungalow lot at Barbara Forest Park, Lenggeng computed from 28 February 2002 as seen in exh. "LCK3" of encl. 4:

(a) stage 2 – delay of 476 days by the plaintiff in paying and it is still continuing;

(b) stage 3 – delay of 350 days by the plaintiff in paying and it is still continuing;

(c) stage 4 – delay of 233 days by the plaintiff in paying and it is still continuing;

(d) stage 5 – delay of 198 days by the plaintiff in paying and it is still continuing; and

(e) stage 6 – delay of 106 days by the plaintiff in paying and it is still continuing.

The sum that was due on 28 February 2002 as seen in exh. "LCK3" of encl. 4 was computed in this fashion:

Please prepare payment for: Stage(s) 2, 3, 4, 5 & 6	RM100,950.50
Add: interest accumulated stage(s) 2, 3, 4, 5 & 6	RM 9,047.36
Quit rent RM17.00	
Total due to us	RM110,014.86

So, from all these factual background, the learned counsel for the defendant submitted that the party that initially breached the said agreement by defaulting to pay and failing to pay the instalments of the purchase price payable under cl. 5(1) of the said agreement was none other than the plaintiff. And that payment of the purchase price was certainly the essence of the contract between the parties. In cl. 25 of the said agreement, it specifically states that:

> Time shall be the essence of the contract in relation to all the provisions of the Agreement.

And this means that time too is considered to be of the essence of the contract "in relation to all the provisions of the agreement." And when translated to the factual matrix of the present case, it meant that promptness in the payment of the instalments was also the essence of the contract between the parties.

Calculation wise, the parties entered into the said agreement on 8 September 1997 and vacant possession was supposed to be delivered not later than thirty (30) calendar months from that date and this meant that on 8 March 2000 the defendant had to deliver vacant possession. But when the period for delivery of vacant possession was extended to not later than fifty four months from 8 September 1997 the defendant had to deliver vacant possession on 8 March 2002. That would be the correct calculation, but the parties by way of a statement of agreed facts had agreed that the date for the delivery of vacant possession would be on or before 25 February 2002. Be that as it may, it must be recalled that by the "supplementary agreed facts" the parties agreed that the defendant had sent out a letter dated 12 April 2002 requiring the plaintiff to take vacant possession and failing which vacant possession would be deemed delivered on 26 April 2002. So, the delay in delivering vacant possession by the defendant was for a period of 1 month 18 days which was equivalent to 48 days (26 April 2002 minus 8 March 2002). Or, if the calculation was based from 12 April 2002, then the delay came up to 1 month

4 days which was equivalent to 34 days (12 April 2002 minus 8 March 2002). Or, if the calculation was based from 25 February 2002, then the delay would be for 2 months 1 day or 61 days (26 April 2002 minus 25 February 2002). It seemed that the parties accepted the delay of the defendant to be for 34 days. This delay of 34 days will be the length of the delay to deliver vacant possession on the part of the defendant and it is this period of delay that this court is bound to hold and will hold accordingly. But the delay on the part of the plaintiff to pay the defendant for the stages of development of the bungalow lot was far more serious. For instance, for stage two, the delay was for 476 days and still continuing until today. It is said that rescission is not only a legal remedy; but it is also an equitable remedy and the maxim that he who comes to equity must come with clean hands should be put in the forefront. So, it was vigorously argued for the defendant that the plaintiff had failed to come with clean hands. It was also argued that that the plaintiff should not be given the right to rescind both the agreements because to do so would cause grave injustice to the defendant. These submissions are indeed interesting. I have this to add.

According to the case of *Meyers v. Casey* [1913] 17 CLR 90 at p. 124, "No court of equity will aid a man to derive advantage from his own wrong, and this is really the meaning of the maxim." But, according to a long line of authorities, the undesirable behaviour must involve more than merely a "general depravity"; and that it must have "an immediate and necessary relation to the equity sued for; it must be a depravity in a legal as well as in a moral sense" (*Dering v. Earl of Winchelsea* [1787] 1 Cox 318 at p. 319 to p. 320; *Moody v. Cox* [1917] 2 Ch 71; *Argyll v. Argyll* [1967] Ch 302 at p. 331 to p. 332; and *Myers v. Casey (supra)*). But Brandeis J in *Loughran v. Loughran* [1934] 292 US 216 at 229 aptly said that, "Equity does not demand that its suitors shall have led blameless lives." As against this, it is also said that the plaintiff must be prepared to do what is right and fair and that the plaintiff must show that his past record in the transaction was clean, after all "he who has committed iniquity … shall have Equity" (*Jones v. Lenthal* [1669] 1 Ch Cas 154).

The learned counsel for the defendant drew my attention to s. 55 of the Contracts Act 1950 where it is enacted as follows:

> 55. Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises.
>
> When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, the promisor cannot claim the performance

of the reciprocal promise, and must make compensation to the other party to the contract for any loss which the other party may sustain by the non-performance of the contract.

ILLUSTRATIONS

(a) A hires B's ship to take in and convey, from Kelang to Singapore, a cargo to be provided by A, B receiving a certain freight for its conveyance. A does not provide any cargo for the ship. A cannot claim the performance of B's promise, and must make compensation to B for the loss which B sustains by the non-performance of the contract.

(b) A contracts with B to execute certain builders' work for a fixed price, B supplying the scaffolding and timber necessary for the work. B refuses to furnish any scaffolding or timber, and the work cannot be executed. A need not execute the work, and B is bound to make compensation to A for any loss caused to him by the non-performance of the contract.

(c) A contracts with B to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and B engages to pay for the merchandise within a week from the date of the contract. B does not pay within the week. A's promise to deliver need not be performed, and B must make compensation.

(d) A promises B to sell him one hundred bales of merchandise, to be delivered next day, and B promises A to pay for them within a month. A does not deliver according to his promise. B's promise to pay need not be performed, and A must make compensation.

and he stressed that by the illustrations thereto it clearly showed that the plaintiff as the promisor of the promise had failed to perform its part of the bargain and so it cannot now claim the performance of the reciprocal promise and that it was the plaintiff who must make the compensation to the defendant for the defendant's loss. Reliance was also placed by the learned counsel for the defendant on s. 37 of the Specific Relief Act 1950 which enacts as follows:

37. Court may require party rescinding to do equity.

On adjudging the rescission of a contract, the court may require the party to whom the relief is granted to make any compensation to the other which justice may require.

and he too relied on the case of *Ganam d/o Rajamany v. Somoo s/o Sinnah* [1984] 2 MLJ 290, where Seah FJ (as he then was) writing for the then Federal Court had this to say (see p. 299 of the report):

Now, section 37 provides that 'on adjudging the rescission of a contract, the court may require the party to whom the relief is granted to make any compensation to the other which justice may require'. The principle underlying this section is whether compensation should be awarded at all or what should be the measure of compensation must depend on the special circumstances of each case. The aim shall be to restore the contracting parties as much as possible to the same position which existed before the contract. In other words, there should be a restitution of the benefits received. As Lord Blackburn rightly pointed out in *Erlanger v. New Sombrero Phosphate Co. (supra)* at page 1278:

> It would be obviously unjust that a person who has been in possession of property under the contract which he seeks to repudiate should be allowed to throw that back on the other party's hands without discounting for any benefit he may have derived from the use of the property, or if the property, though not destroyed, has been in the interval deteriorated, without making compensation for that deterioration.

In short, he who seeks equity must do equity. Applying this to the facts of this case, we would make an order that the defendant should be entitled to compensation only by way of the return of the sum of $26,000.00 paid by him to the plaintiff and we so order. In our opinion, no man can at once treat the contract as avoided by him, so as to assume the property which he parted with it, and at the same time keep the money or other advantage which he has obtained under it. In our judgment, the defendant is not entitled to damages when the contracts are cancelled by the court under section 36 of the Specific Relief Act 1950, and we make no order under this head.

Earlier on his Lordship Seah FJ spoke of s. 36 of the Specific Relief Act 1950 and this was what he said (see p. 298 to p. 299 of the report):

Now, the power of the court to make an order rescinding a contract is contained in Chapter IV of the Specific Relief Act 1950 and the second limb of section 36 is particularly relevant to this case and it reads:

> ... and the court, if it refuses to enforce the contract specifically may direct it to be rescinded and delivered up accordingly.'

But the rescission of a contract in writing cannot be adjudged unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made (see section 35). This is what Lord Blackburn had to say about this in the case of *Erlanger v. New Sombrero Phosphate Co.* (1877-78) 3 App Cas 1218, 1278:

> It is, I think, clear on principles of general justice, that as a condition to a rescission there must be restitutio in integrum. The parties must be put in status quo. See per Lord Cranworth in *Addie vs. The Western Bank* LR. 1 HL 165. It is a doctrine which has often been acted upon both at law and in equity ... '

> In our judgment, having regard to the facts of this case, it is a fit and proper case for us to exercise our jurisdiction contained in the second limb of section 36 since we are satisfied that there is no difficulty in restoring the plaintiff and the defendant to their original position and we hereby rescind the contracts marked as Ex. P1 and P2 accordingly. A *fortiori*, a considerable time (almost ten years) has lapsed since the parties executed the said contracts.

Finally, at p. 300 of the report, his Lordship Seah FJ rounded up the matter in these words:

> Under the circumstances of the case, we allow the plaintiff to set-off against the $26,000.00 which she is ordered to pay to the defendant as compensation.

Now, using *Ganam's* case as an authority, a submission was made to the effect that in all fairness the defendant was willing to pay for the damages for late delivery to be set off against the purchase price but the plaintiff who had breached both the agreements was unwilling to make the necessary payment that was due to the defendant. It was emphasised by the learned counsel for the defendant that under the said agreement, the plaintiff had no right of termination and that the right to terminate under the said agreement was accorded only to the defendant. For this proposition he relied on the judgment of Siti Norma Yaakob JCA (now FCJ) in the case of *Pusat Bandar Damansara Sdn Bhd & Anor v. Yap Han Soo & Sons Sdn Bhd* [2000] 1 CLJ 346 and there her Ladyship aptly said at p. 354 of the report:

> The rights, interests and obligations of all parties to the agreement are spelt out in the various sections of the agreement and it is within the four corners of the agreement that such interests have to be interpreted and determined.

I am required to look at the said agreement and by clause 8 thereto it is the defendant who is authorised to terminate the said agreement. That cl. 8 of the said agreement is worded as follows (see exh. "GBK1" of encl. 2):

> 8. DEFAULT BY PURCHASER AND DETERMINATION OF AGREEMENT
>
> (1) If the Purchaser:
>
> (a) fails to pay any instalment of the purchase price payable under Clause 5(1) in accordance with the Fourth Schedule hereto or any part thereof or any interest payable under Clause 7 hereof; or
>
> (b) fails to pay any other sum or sums payable under this Agreement within the time stipulated for payment; or
>
> (c) commits any breach of the terms or conditions contained in this Agreement or fails to perform or observe all or any of the Purchaser's covenants herein contained; or

(d) before payment in full of the purchase price of the said Plot, commits an act of bankruptcy or enters into any composition or arrangement with his creditors or, being a company, enters into liquidation, whether compulsory or voluntary; or

(e) suffers any execution to be levied upon him or his goods;

the Vendor may, subject to sub-clause (2) hereof, take such legal action as it deems fit in the circumstances or annul the sale of the said Plot and forthwith terminate this Agreement and in such an event:

(i) the Vendor shall be entitled to deal with or otherwise, dispose off the said Plot in such manner as the Vendor shall see fit as if this Agreement had not been entered into and shall not be accountable to the Purchaser for any profit arising from the re-sale of the said Plot;

(ii) the instalments or payment(s) previously paid by the Purchaser to the Vendor, excluding any interest paid, shall be dealt with and disposed off as follows:

(a) firstly, all interest(s) calculated in accordance with Clause 7 hereof owing and unpaid shall be paid to the Vendor;

(b) secondly, all payment(s) other than interest(s) and instalments due and payable to the Vendor under this Agreement shall be paid to the Vendor;

(c) thirdly, a sum equivalent to twenty per centum (20%) of the purchase price of the said Plot (if already paid) shall be forfeited to the Vendor as agreed liquidated damages; and

(d) lastly, the residue thereof (if any) shall be refunded to the Purchaser free of any interest.

(iii) neither party hereto shall have any further claim against the other for costs, damages, compensation or otherwise hereunder; and

(iv) the Purchaser shall pay any other costs and expenses (including the Vendor's Solicitor's costs and expenses) incurred in the matter.

(2) If the Purchaser fails to comply with any of the terms of this Agreement or if any monies shall remain unpaid on the due date, the Vendor shall give the Purchaser or his solicitors not less than fourteen (14) days notice in writing by A.R. Registered post to remedy the breach and unless in the meanwhile such default and/or breach alleged is rectified or such unpaid monies and interest(s) are paid, the Vendor may forthwith proceed with such legal action as it deems fit or as the case may be, this Agreement shall, at the expiration of the said notice, be deemed to be terminated.

Clause 8 (1) of the said agreement as reproduced above would be of relevance and this very clause will be referred to at a later stage of this judgment.

By way of a reply, the learned counsel for the plaintiff submitted along the following lines:

(1) That the defendant had relied heavily on the principle of equity.

(2) That exhs. "LCK1", "LCK2", "LCK3", "LCK4" and "LCK5" of encl. 4 were mere reminders and not notices to rescind the said agreement.

(3) That the allegation by the defendant that the plaintiff could not rely on the defendant's delay in handing over vacant possession since the plaintiff itself had breached the said agreement by not paying the progressive payments was said to be unsustainable as there was no notice to rescind the said agreement by the defendant and that at best the defendant had waived their right to terminate the said agreement. Reliance was placed on the case of *Sea Housing Corporation Sdn Bhd v. Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305 FC.

I pause here to say that as alluded to in the early part of this judgment, the defendant had by letter dated 30 April 2002 terminated both the agreements and I had reproduced that letter earlier. So it is wrong to say that the defendant did not terminate both the agreements. Moreover, the case of *Sea Housing Corporation Sdn Bhd v. Lee Poh Choo (supra)* was governed by the Housing Developers (Control and Licensing) Act, 1966 and the Housing Developers (Control and Licensing) Rules, 1970, whereas the present case are outside the purview of the said Act and the Rules. In that case too – referring to the case of *Sea Housing Corporation Sdn Bhd v. Lee Poh Choo (supra)*, the issue before the then Federal Court was whether the purchaser who was claiming for liquidated damages in the sum of RM27,826.66 as from 2 July 1975 to 1 June 1977 was entitled to set off the damages for the delay against the last payment of RM17,907.20 due to the developer. And the then Federal Court held that as the transaction was governed by the Housing Developers (Control and Licensing) Act 1966 and the Housing Developers (Control and Licensing) Rules 1970, the developer could not rely on cl. 32 which was inconsistent with the said Act and the Rules and that the purchaser was entitled to the set-off as it would be manifestly unjust to allow the developer to enforce payment without taking into account the cross-claim. Here, however, the facts are entirely different. Here, the plaintiff was not claiming a right of set-off. But the defendant was willing to concede to a set-off as the sum owing to the defendant by the plaintiff purchaser (exclusive of interest) is said to be in the sum of RM181,710.99 – being the balance of the purchase price, while the liquidated damages for the delay of delivering vacant possession of the bungalow lot for

34 days would amount to RM2,256.87 where the calculation would be on the following basis:

$$\frac{34}{365} \text{ x RM } 201{,}901 \text{ x } 12\%$$

These were the submissions of the learned counsel for the defendant and the calculation advanced by that learned counsel was certainly ingenious. The 12% constituted the rate per annum of the purchase price as envisaged under cl. 16 (3) of the said agreement. And so the defendant prayed that the plaintiff's claim be dismissed with costs.

But the plaintiff through its learned counsel continued to submit and he submitted that the fact that the plaintiff did not pay the instalments did not mean that the plaintiff had breached both the agreements because the plaintiff had rightfully terminated both the agreements by their solicitors' notice dated 19.4.2002 even before the defendant had taken any action to terminate. It was further submitted by the learned counsel for the plaintiff that it was irrelevant that the late delivery for vacant possession was a mere 34 days because the issue was whether the defendant had breached cl. 16(1) of the said agreement and the supplemental agreement by not handing over delivery of vacant possession to the plaintiff within fifty four (54) months – namely, before or on 25 February 2002. It was because of the breach by the defendant to deliver vacant possession some 34 days later, that the learned counsel for the plaintiff submitted vigorously that the plaintiff was entitled to rescind both the agreements. It was further submitted by the learned counsel for the plaintiff that it was misconceived and wrong in law for the defendant to rely on s. 55 of the Contracts Act 1950 since time was the essence of both the agreements and that the defendant had failed to perform within the prescribed time as stipulated under both the agreements. It was submitted by the learned counsel for the plaintiff that the correct section of the law would be s. 56 of the Contracts Act 1950 which enacts as follows:

> 56 Effect of failure to perform at fixed time, a contract in which time is essential.
>
> (1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.
>
> Effect of failure when time is not essential.

(2) If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do the thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by the failure.

Effect of acceptance of performance at time other than that agreed upon.

(3) If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of the promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of the acceptance, he gives notice to the promisor of his intention to do so.

The learned counsel for the plaintiff then proceeded to distinguish *Ganam's* case – a case that was relied upon by the defendant. He pointed out that in *Ganam's* case, time was not the essence of the contract and that there was no notice that was given to rescind the contract. Whereas in the present case at hand, time was said to be of the essence of both the agreements and that the plaintiff had rightfully given the notice of termination. In regard to the case of *Pusat Bandar Damansara Sdn Bhd & Anor v. Yap Han Soo & Sons Sdn Bhd (supra)*, a case which was relied upon by the defendant, it was submitted by the learned counsel for the plaintiff that that case was distinguishable and irrelevant for the following reasons:

(1) that time being of the essence was not alluded to in that judgment;

(2) that s. 56 of the Contracts Act 1950 was not referred to in that case;

(3) that there was no issue pertaining to the question of late delivery;

(4) that the purchaser in that case had defaulted in paying the balance of the purchase price and the appellant there had given a proper notice to terminate the contract; and

(5) that the right of termination was not accorded to the purchaser because there was no such default or breach by the developer.

All these distinguishing features were dutifully noted. The learned counsel for the plaintiff submitted that it was crystal clear and manifest that the defendant had breached both the agreements by not handing over the delivery of vacant possession within the prescribed time and that breach was said to have given the plaintiff the right to rescind both the agreements and to seek a refund of the deposit that was paid. For all these reasons, it was submitted that the plaintiff's originating summons in encl. (1) should be allowed with costs.

Not to be outwitted, the learned counsel for the defendant responded. He proceeded to distinguish *Chye Fook's* case and he relied on the passages in that judgment and he referred to p. 310 to p. 311 of the report of that case:

> Since it is a question of construction depending on the facts of each case as to whether there has been a substantial failure of performance or a breach of an essential term, perhaps what Lord Diplock said in *Photo Production Ltd v. Securicor Transport Ltd* [1980] AC 827 may throw some light on the matter. He had said that 'where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract, the party not in default may elect to put an end to all primary obligations of both parties remaining un-performed'.

and he submitted that in the present case the plaintiff was not an innocent party as he was also in default in not paying the instalments when it fell due. In *Chye Fook's* case too, only "the plaintiffs' house had been built out of a row of terrace houses and also no other houses could be seen in the area. Since, from the photographs, the plaintiffs' house appears to be the only house built in the area, it is possible that the construction could have even begun after the completion date" (see p. 311 of the report). Here, vacant possession was handed over; but it was delayed by 34 days.

The learned counsel for the defendant then referred to the case of *Kang Yoon Mook Xavier v. Insun Development Sdn Bhd (supra)*, and he submitted that the plaintiff in that case was an innocent party. Here, however, the plaintiff was not the innocent party or the injured party because the plaintiff had also breached both the agreements by failing to pay the instalments that were due and forthcoming. The defendant then prayed that the plaintiff's originating summons in encl. (1) should be dismissed with costs.

Should I grant the prayers as sought for in encl. (1)? That is the crucial question to pose.

There was reference to s. 56 of the Contracts Act 1950 and that section provides that failure to perform within a fixed time in a contract, especially where time is an essential element, would render the contract voidable. But as is usual, difficulties still remain until today, when one is faced with the question of determining when time would be regarded as of the essence of the contract. It is quite apt to say that at common law – everyone who is schooled in law ought to know, that time was always regarded as of the essence of the contract in a land transaction – particularly in the sale of land. But, equity did not adopt such a view. It seems that the application of equity towards time would not apply in those cases where the parties had expressly agreed that time should

be of the essence. In *Jamshed Khodaram Irani v. Burjorji Dunjibhai* [1916] LR 43 IA 26, the Privy Council held that s. 56 of the Indian Contracts Act did not lay down any principle of law which differed from the equitable principles under the English law in relation to time in contracts for the sale of land. It is noteworthy to note that this view of the Privy Council in that case has been readily adopted and applied in two cases, namely, *Ayadurai v. Lim Hye* [1959] MLJ 143; and *Ismail Bin Haji Embong v. Lau Kong Han* [1970] 2 MLJ 213. The Privy Council in the case of *Yeow Kim Pong (Realty) Ltd v. Ng Kim Pong* [1962] MLJ 118, was of the view that the effect of s. 56(3) of the Contracts Act 1950 was only to prevent a party from bringing a subsequent action for compensation for non-performance. The section too, according to the Privy Council, did not prevent the parties from reaffirming the contract in its original form or even in its varied form. The Privy Council also held that the parties could still be bound by the original contract.

But it must be emphasised that in most commercial transactions time is always listed to be of the essence of the contract (*Himatsing & Co. v. Joitaram* [1970] 2 MLJ 246). In *Sharikat Eastern Plastics Industry v. Sharikat Lam Seng Trading* [1972[1 MLJ 21, Mohamed Azmi J (who later rose to be the Supreme Court judge) held that when time is of the essence of the contract, it may be waived by granting an extension of time for performance. Of pertinence would be the Privy Council's case of *Aberfoyle Plantations Ltd v. Khaw Bian Cheng* [1962] MLJ 174 and there the following germane principles were laid down in relation to time in conditional contracts:

(1) where a date for the completion of the sale is fixed by contract, then by that date the contract must be fulfilled;

(2) where no date is fixed for the completion of the sale, then the fulfillment of the contract must be within a reasonable time; and

(3) in a situation as envisaged in (1), then the date for completion of the sale must be strictly adhered to and that time is not to be extended by reference to equitable principles.

At common law, a strict approach is always adopted. To illustrate, I need to refer to the case of *Parkin v. Thorold* [1852] 16 Beav 59, 65, where Sir John Romilly MR, aptly said, "at law time is always of the essence of the contract. When any time is fixed for the completion of it, the contract must be completed on the day specified, or an action will lie for breach of it." At common law, it is very clearly stated that: references to time are generally regarded to be of the essence of the contract and that a party could treat the contract as being repudiated if the other party failed to perform his side of the bargain on the date as specified in the contract.

But in equity, the rule is very relaxed. In *Lock v. Bell* [1931] 1 Ch 35, 43, it was held that:

> The court of equity was accustomed to relieve against a failure to keep the date assigned …. if it could do justice between the parties.

In my judgment, the question as to whether a stipulation as to time is of the essence may readily be resolved by looking at the terms of the contract itself. This is the best approach to adopt and it will never go wrong. Thus, in the context of the present case, time was certainly regarded to be of the essence of the contract and it would extend "to all the provisions of the agreement". That being the case, time would dictate all the provisions of the said agreement. So time plays a role in the following crucial areas:

(1) in paying the instalments that were due and the delays for stage 2, stage 3, stage 4, stage 5, and stage 6 as alluded to somewhere in this judgment should not have happened; and

(2) in delivering vacant possession on or before 25 February 2002.

Unfortunately, the plaintiff only paid the first 10% and thereafter there was no payment made at all despite the notices as alluded to earlier. There was blatant non compliance by the plaintiff of the "Schedule of Payments" as set out in cl. 5 of the said agreement which was reproduced earlier. These were my judgments and I so hold accordingly.

When the defendant did not deliver vacant possession on or before 25 February 2002, the plaintiff proceeded to give the notice of termination dated 19 April 2002 to the defendant. But the defendant by letter dated 12 April 2002 required the plaintiff to take vacant possession and failing which vacant possession would be deemed to be delivered on 26 April 2002. This was a case where the defendant gave vacant possession 34 days after the deadline. The redeeming feature would be this: that the defendant had, unlike some other unscrupulous developers, given vacant possession to the plaintiff. So, when the defendant gave vacant possession 34 days past the scheduled dateline, the defendant as the vendor "shall pay immediately to the purchaser (referring to the plaintiff) liquidated damages to be calculated from day to day at the rate of twelve per centum (12%) per annum of the purchase price" (see cl. 16(3) of the said agreement). The liquidated damages as calculated and suggested by the learned counsel for the defendant is in the sum of RM2,256.87 and this was alluded to earlier. And by letter dated 30 April 2002, the defendant terminated both the agreements.

This was also a case where both the parties – the plaintiff and the defendant, have terminated both the agreements. They were no longer interested in contracting with one another. In fact, under the said agreement only the defendant is authorised to terminate the said agreement. The plaintiff has no power to terminate the said agreement and this is clearly borne out in cl. 8 of the said agreement. So, after the defendant had terminated both the agreements by letter dated 30 April 2002, the defendant was entitled to those remedies as exemplified in cl. 8(1)(i) to cl. 8(1)(iv) of the said agreement. These remedies are certainly of great benefit to the defendant.

To answer the crucial question posed by me earlier as to whether I should grant the prayers as sought for by the plaintiff in encl. (1), I would answer it in the following manner:

(1) Under prayer (8) of encl. (1), a necessary and fair order would be to declare that both the agreements have been terminated. Both the parties are no longer interested in contracting with one another.

(2) The defendant as the vendor is entitled to deal with or dispose off the bungalow lot in such manner as the defendant shall see fit as if both the agreements had not been entered into and the defendant shall not be accountable to the plaintiff as the purchaser for any profit arising from the re-sale of the bungalow lot.

(3) The instalments or payments previously paid by the plaintiff as the purchaser to the defendant as the vendor, excluding any interest paid, shall be dealt with and disposed off according to cl. 8(1)(ii)(a) to cl. 8(1)(ii)(d) of the said agreement.

(4) Whatever monies paid by the plaintiff as the purchaser to the defendant as the vendor, excluding any interest paid, which must include the 10% deposit amounting to RM20,190.10, shall be dealt with and disposed off according to cl. 8(1)(ii)(a) to cl. 8(1)(ii)(d) of the said agreement.

(5) Clause 8(1)(ii)(a) to cl. 8(1)(ii)(d) of the said agreement read as follows:

(a) all interests calculated in accordance with cl. 7 hereof owing and unpaid shall be paid to the defendant as the vendor;

(b) all payments other than interest(s) and instalments due and payable to the defendant as the vendor under the said agreement shall be paid to the defendant as the vendor;

(c) a sum equivalent to 20% of the purchase price of the bungalow lot (if already paid) shall be forfeited to the defendant as the vendor as agreed liquidated damages; and

(d) the residue thereof (if any) shall be refunded to the plaintiff as the purchaser free of any interest.

(6) Neither party (be it the plaintiff or the defendant) shall have any further claim against the other for costs, damages, compensation or otherwise hereunder.

(7) The plaintiff as the purchaser shall pay any other costs and expenses (including the defendant's solicitor's costs and expenses) incurred in these proceedings.

In order to ensure compliance with the Orders of this court at numbers (3), (4), 5 (a) to 5 (d), (6) and (7) as stipulated above, the matter should be referred to either the senior assistant registrar or the deputy registrar forthwith for an in-depth assessment of the damages.

And as agreed by the parties hereto, the decision in this judgment binds the two other cases as alluded to earlier, namely:

(1) originating summons no: S3-24-2330-2002; and

(2) originating summons no: S5-24-1248-2002.